No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GENE A. TYRRELL – PETITIONER

vs.

UNITED STATES OF AMERICA –
RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gene A. Tyrrell, Reg. No. 80041-008
Federal Prison Camp
P.O. Box 5000
Florence, Colorado 81226-5000
No Phone Number
PETITIONER PRO SE

QUESTION(S) PRESENTED

Whether Petitioner is entitled to have his appeal remanded to the Circuit Court for review of Petitioner's money laundering convictions and sentence(s) pursuant to the Supreme Court's decision in UNITED STATES vs. Santos, 553 US ____, 170 L. ED.2D 912 (2008), a case that was decided after submission of Petitioner's case before the Circuit Court, and after Petitioner's appeal was decided on appeal in the Circuit Court.

Whether Petitioner's convictions for money laundering, and Petitioner's sentence of 136 months confinement, are subject to being vacated pursuant to the Supreme Court's decision in UNITED STATES vs. SANTOS, 553 US ____, 170 L.ED.2D 912 (2008), as there is no evidence to support a finding beyond a reasonable doubt that the proceeds alleged in Counts 32-38 of the Second Superceding Indictment were derived from profits from the underlying criminal enterprise.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTION(S) PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 21

APPENDIX

Decision of the US Court of Appeals, Eleventh Circuit (unpublished) opinion on direct appeal March 17, 2008..... App. 1

Denial of Petition for Rehearing En Banc by US Court Of Appeals, Eleventh Circuit June 09, 2008..... App. 43

TABLE OF AUTHORITIES

CASES Page

ARIZONA v SAN CARLOS APACHE TRIBE, 463 US 545 (1983)..... 18

BLAKELY v WASHINGTON, 542 US 296 (2004)...5

BROWN v LOUISIANA, 447 US 323 (1980).....7

COHENS v VIRGINIA, 19 US 264 (1821).....18

COLORADO RIVER WATER v US, 424 US 800 (1976).....18

DESIST v US, 394 US 244 (1969) 9

ENGLAND v LOUISIANA MEDICAL EXAMINERS, 375 US 411 (1964)..... 18

GRIFFITH v KENTUCKY, 479 US 315 (1987).....7

HANKERSON v NORTH CAROLINA, 432 US 233 (1977).....8

HARLIN v MISSOURI, 439 US 459 (1979).....8

LINKLETTER v WALKER, 381 US 618 (1965).....7

MARBURY v MADISON, 1 CRANCH 137 (1803)....8

TABLE OF AUTHORITIES - Continued

CASES Page

MILLER-EL v *COCKRELL*, 537 US 322 (2003).....19

STRICKLAND v *WASHINGTON*, 466 US 668 (1984).....10

US v *BOOKER*, 543 US 220 (2005)..... 5

US v *JOHNSON*, 457 US 537 (1982).....7

US v *SANTOS*, 553 US ___(2008)..... 4

WILLIAMS v *US*, 401 US 646 (1971)..... 18

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix 1 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 17, 2008.

A timely petition for rehearing was denied by the United States Court of Appeals on June 9, 2008 and a copy of the order denying rehearing appears at Appendix 43.

The jurisdiction of this Court is invoked under 28 U.S,C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 USC § 1956 (a) (1)

U.S. CONST., Art. III, §2

STATEMENT OF THE CASE

November 16, 2004 a grand jury in the Middle District of Florida, Tampa Division, indicted Petitioner for conspiracy to commit securities fraud, wire fraud and mail fraud, all in violation of 18 USC § 371; securities fraud in violation of 15 USC § 78j (b); mail fraud in violation of 18 USC § 1341; and several counts of money laundering in violation of 18 USC § 1956(a) (1) (A). Petitioner was convicted of the conspiracy, one count of securities fraud, seven counts of mail fraud and seven counts of money laundering. Petitioner was sentenced to 136 months confinement on the money laundering, 120 months confinement on the securities fraud count, and 60 months confinement on mail fraud, all counts of conviction to be served concurrently. Petitioner is currently serving his sentence in the federal prison camp at Florence, Colorado.

This petition arises solely upon the issue of whether Petition is entitled, and he is, to have his case reviewed by the Circuit Court in light of this

Court's holding in UNITED STATES v SANTOS, 553 US ___, 170 L.ED.2D 912 (2008), a case that was decided by this Court June 2, 2008, while Petitioner's rehearing motion was still pending [decided June 9, 2008 (App. 43)], and prior to the time having expired for filing a petition for a writ of certiorari.

This Court, in SANTOS, determined a new interpretation of a statute enacted by Congress, to wit: the federal money laundering statute, 18 USC § 1956 (a)(1), by finding that "proceeds" mean "profits", not "revenue" for purposes of the money laundering statute, an interpretation of the statute that was precluded by precedent prior to June 2, 2008 and this Court's decision in SANTOS. As SANTOS was decided while Petitioner's case was still pending direct appeal, and prior to the time expiring for the filing of this petition, the prudent method of permitting review of Petitioner's case pursuant to SANTOS is remand to the Circuit Court

for such review. This procedure is not without precedent given the remand of numerous cases after this Court's decisions in BLAKELY v WASHINGTON, 542 US 2296 (2004) AND US v BOOKER, 543 US 220 (2005).

REASONS FOR GRANTING THE PETITION

1. Petitioner is entitled to have his appeal remanded to the Circuit Court for review of Petitioner's money laundering conviction(s) and sentence(s) pursuant to the Supreme Court's decision in UNITED STATES v SANTOS, 553 US ___, 170 L.ED.2D 912 (2008), a case that was decided after submission of Petitioner's case before the Circuit Court, and after Petitioner's appeal was decided in the Circuit Court, but before time expired for the filing of the instant petition for a writ of certiorari.

This request for remand to the Circuit Court is predicated upon this Court's decision in UNITED STATES v SANTOS. In SANTOS this Court determined, for the first time, a new interpretation of a statute enacted by Congress, the federal money

laundering statute, 18 USC § 1956(a)(1). Petitioner was indicted for, tried and convicted of eight counts of money laundering, and he was sentenced to 136 months confinement on all those counts, to be served concurrently. In SANTOS this Court determined that for purposes of 18 USC § 1956(a)(1) "proceeds" means "profits", and if no evidence exists to support a finding beyond a reasonable doubt that the defendant committed money laundering by use of "profits" from the underlying criminal enterprise, then that conviction was invalid.

Petitioner was convicted of committing violations of 18 USC § 1956(a)(1) (A) on seven (7) separate occasions, as well as, conspiring to commit money laundering in violation of 18 USC § 1956(h) on one occasion. As such, there are eight (8) convictions for violations of the money laundering statute, a statute that had not been interpreted as this Court interpreted the statute in SANTOS, supra., prior to Petitioner's trial and appeal. The specific interpretation of the money laundering statute

announced by this Court in SANTOS was precluded by precedent prior to SANTOS, and prior to Petitioner's trial and appeal.

It is axiomatic, and well settled, that had the issue announced and decided in SANTOS been raised and made a part of the Petitioner's trial, and appeal, that Petitioners would have been given the benefit of the Court's decision in SANTOS as a matter of law. Decisions announced by this Court are fully retroactive to cases pending on direct appeal and not yet final. GRIFFITH v KENTUCKY, 479 US 314 (1987). Forty-three years ago this Court adopted a three prong standard for application of decisions of this Court retroactively, LINKLETTER v WALKER, 381 US 618 (1965), and since that time the Court has repeatedly found and held all defendants whose cases are pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule. US v JOHNSON, 457 US 537, 545 (1982); BROWN v LOUISIANA, 447

US 323 (1980); HARLIN v MISSOURI, 439 US 459, 460 (1979 (Powell, J., Concurring); HANKERSON v NORTH CAROLINA, 432 US 233, 245 (1977) (Marshall, J., Concurring).

Thirty-nine years ago Justice Harlan announced the opinion of the Court that was eventually adopted in toto by the stare decisis of this Court as to why cases pending direct review should have decisions by this Court applied retroactively. Justice Harlan wrote, at the time in a dissenting opinion, a decision that has now become the majority view of this Court:

> "...Matters of basic principle are at stake. In the classical view of constitutional adjudication... criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case require their resolution for a just adjudication on the merits. CITING; MARBURY v MADISON, 1 CRANCH 137 (1803). We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when

> another similarly situated defendant comes before us, we must grant the same relief or give a principle reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."

DESIST v US, 394 US 244, 256-269 (1969) (Harlan, J., Dissenting). The surviving principle justified so eloquently by Justice Harlan thirty-nine (39) years ago is that the fundamental principles of judicial review and constitutional supremacy dictate that a decision announced by this Court must always be applied retroactively to cases pending direct review, when the defendant in that case so pending direct review comes before this Court asking for such relief.

It is precisely that circumstance that is presented to this Court in the instant petition. Petitioner, whose case is not final, and the time for which filing this petition has not expired, is asking this Court to permit the application of this Court's decision regarding the money laundering statute in SANTOS,

supra., to be applied retroactively to his case. The only procedural mechanism for such application is that this Court remand the case to the Circuit Court for further proceedings consistent with SANTOS.

The precise issue presented in Santos was not litigated by Petitioner's counsel, either in the District Court, or in the Circuit Court. And whether that failing fell within the province of this Court's holding in STRICKLAND v WASHINGTON, 466 US 668 (1984) is not an issue that this Court can decide at this juncture. It is interesting to note, however, that the issue decided in SANTOS indicates a possible abuse on the part of prosecutors, in general, and the instant prosecution team in particular, to use the money laundering statute(s) as a mechanism for over-prosecution. It is to that reality that the Court addressed its decision, and it is to that reality that this Court should remand to the Circuit Court for further review. Justice Scalia wrote:

> "...The government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime. Interpreting "proceeds" to mean "profits" eliminates the merger problem..."

ID., US v SANTOS, supra., at 553 US ___; 170 L.ED.2D at 922.

This overprosecution problem is neither new, nor novel. Criminal Law Reporter, Vol. 61, at p. 1566 reported the problem years ago, from a more than prestigious source. The Report quoted:

> "...When the commission [Sentencing Commission] first drafted the Sentencing Guidelines, it assumed the Guidelines would be used in organized crime cases, and therefore set the penalties very high. However, as soon as the prosecutors figured out that the penalties were much higher than those for other crimes, they began to pursue money laundering charges in a broad array of cases."

61 Crim.Law Rptr. 1566. In Justice Breyer's separate opinion in SANTOS, noting that Justice

Breyer was a member of the very sentencing commission that drew the money laundering Guidelines, the over-prosecution issue was raised. Justice Breyer wrote:

> "...Like the plurality, I doubt that Congress intended the money laundering statute automatically to cover financial transactions that constitute an essential part of a different underlying crime... It is difficult to understand why Congress would have intended the government to possess this punishment-transforming power..."

ID., SANTOS, supra. 553 US ___,170 L.ED.2D at 929-30. By all appearances the problem with the government using the money laundering statute to facilitate over-prosecution has been around for quite awhile, and in SANTOS this Court took the opportunity to remedy the problem by re-interpreting the statute.

Which all begs the question whether this Court should remand this appeal to the Circuit Court with instructions to reconsider Petitioner's case pursuant to and consistent with this Court's recent SANTOS

decision. Is Petitioner entitled to remand? All indications are that the stare decisis of this Court is that all notions of judicial review and constitutional supremacy require that all decisions of this Court are retroactively applicable to cases not yet final, or cases, like Petitioner's, where the time for filing a petition for a writ of certiorari has not lapsed. By all indications Petitioner should have SANTOS applied retroactively to his case, as his judgment is not yet final, and this petition for writ of certiorari is timely filed.

But, recalling Justice Harlan's words regarding the underlying policy justification for making decision of this Court retroactive to cases not yet final, this Court, in deciding whether to grant certiorari, is constrained to recall that, at the very least, the Court is not authorized to pick and choose which defendants will have new rules applied retroactively. This is not because this Court is in the business of enjoying releasing criminals duly convicted and sentenced. This is because such

application of new rules retroactively is designed to reach a greater evil, that the government has offended traditional notions of fair play and substantial justice. For this reason alone the new rule in SANTOS must be applied to Petitioner's case, and the remand sought by Petitioner is not for a final decision granting relief, but for the Circuit Court to reach the issue instead. The procedure sought is not unknown to this Court, given the history of this Court's actions in the aftermath of BLAKELY v WASHINGTON, 542 US 296 (2004), and its companion case decided a year later, US v BOOKER, 543 US 220 (2005). In both instances hundreds of cases were remanded for further review, again in cases decided by both Justice Scalia and Justice Breyer.

WHEREFORE, Petitioner prays this Court grants a writ of certiorari, to the end that this appeal is remanded to the Circuit Court, to the end that the Circuit Court can reconsider its decision in this case

consistent with the Supreme Court's holding in US v SANTOS.

2. Whether Petitioner's conviction(s) for money laundering, and Petitioner's sentence of 136 months confinement, are subject to being vacated pursuant to the Supreme Court's decision in US v SANTOS, as there is no evidence to support a finding beyond a reasonable doubt that the proceeds alleged in Counts 23 and 32-38 of the Second Superceding Indictment were derived from profits from the underlying criminal enterprise.

The indictment, and second superceding indictment, are empirical evidence that Petitioner's prosecution was pursued by the government in the same manner that prosecutions for money laundering have consistently been pursued since 1987 when the new Guidelines became effective relative to the potential punishments for violations of 18 US § 1956(a)(1). Empirically, the indictment, nor the second superceding indictment, mention "profits". The government's proof in a three month, 15,000

page transcript, trial mention "profits" even once. Petitioner incorporates by reference for all purposes the transcript of the trial, as though copied in full and set forth at length, to evidence the reality that the trial of Petitioner's case never once mentioned the "proceeds" referred to in the allegations of money laundering, and the proof of those allegations, as "profits" from the underlying criminal enterprise.

> The proceeds of specified unlawful activity are the proceeds from conduct sufficient to prove one predicate offense. To establish the "proceeds" element under the "profits" interpretation, "... the prosecution needs to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction. "ID., SANTOS, 170 L.ED.2D at 924.

There is not a single instance of such proof, or even attempted proof, throughout the trial.

Accordingly, at a bare and forgiving minimum, this case should be remanded to the Circuit Court, to permit that Court to review pursuant to SANTOS, and such remand would not offend the stare decisis of this Court.

Empirically, when Petitioner's case was docketed in the Circuit Court, before the Circuit Court would be a defendant who had been charged, convicted and sentenced for multiple violations of the money laundering statute. And equally empirical, is the reality that US v SANTOS was pending certiorari review in this Court at the same time. In fact, SANTOS had prevailed in both the district court and the Seventh Circuit, and the case was before this Court on the government's request for certiorari. At a bare and forgiving minimum the issue reached in SANTOS was alive in the Circuit Court, and yet the Circuit Court did not reach the issue. Rehearing en banc was denied seven days after SANTOS was decided by this Court, and again, the Circuit Court never addressed the issues presented.

An underpinning of the concept of judicial review and constitutional supremacy is that all federal circuit courts having jurisdiction of a direct appeal must adjudicate every issue fairly presented. This Court long ago established that questions, no matter how delicate in nature and however willingly avoided, must be passed upon by the Court in a conscientious effort to perform its constitutional duty. COHENS v VIRGINIA, 19 US 264 (1821). The duty to take and exercise this jurisdiction, McCLELLAND v CARLAND, 217 US 258, 281 (1910); ENGLAND v LOUISIANA MEDICAL EXAINERS, 375 US 411, 415 (1964), has been defined by this Court as an unflagging obligation to exercise the jurisdiction given. ARIZONA v SAN CARLOS APACHE TRIBE, 463 US 545, 571 (1983); COLORADO RIVER WATER v US, 424 US 800, 817 (1976). The concept, one fundamental one, is simply that any court having jurisdiction of a matter on direct review, adjudicate every issue of law, fairly implicated by the trial process below. WILLIAMS v

US, 401 US 646, 675 (1971). These principles apply to Petitioner especially given the particular circumstances of his case. At a bare and forgiving minimum this Court is constrained to grant the relief sought, grant certiorari review, to the end that the Circuit Court is accorded its opportunity to review Petitioner's case in light of SANTOS.

3. Conclusion.

In 2003 this Court decided yet another case applicable to the relief now being sought by Petitioner herein. In MILLER-EL v COCKRELL, 537 US 322 (2003) this Court remained consistent with traditional notions of judicial review and constitutional supremacy. The case and controversy involved the treatment of certificates of appealability in habeas corpus appeals in the Fifth Circuit. The complaint made by the petitioner in that case was that the Fifth Circuit was routinely making a determination, without full review, on the merits of a prisoner's effort to appeal a denial of habeas relief.

All the petitioner was seeking was an opportunity for review, and in that light summary denial and dismissal was rejected as inconsistent with due process.

What Petitioner seeks here is nothing more than the petitioner in MILLER-EL, that he be given an opportunity. That opportunity can only be accomplished, consistent with traditional notions of fair play and substantial justice, if he is permitted to proceed via a grant of certiorari, solely to the extent that the matter is remanded to the Circuit Court. Nothing requested would offend this Court's stare decisis, and nothing requested would offend judicial review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Gene A. Tyrrell, Petitioner Pro Se

Gene A. Tyrrell
Reg. No. 80041-008
Federal Prison Camp
P.O. Box 5000
Florence, Colorado 81226-5000
No phone number
PETITIONER PRO SE

COPY

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14492

D.C. Docket No. 02-0011-CR-T-17MAP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GENE A. TYRRELL,
DEAN A. SINIBALDI,
JOSEPH CUCINIELLO,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(March 17, 2008)

Before EDMONDSON, Chief Judge, CARNES and FAY, Circuit Judges.

PER CURIAM:

Dean A. Sinibaldi ("Sinibaldi"), Joseph Cuciniello ("Cuciniello"), and Gene A. Tyrrell ("Tyrrell"), were part of a conspiracy group which sold false and unregistered security offerings through the Millenium and Stonehedge Groups and caused great losses to many elderly individuals. Appellants were convicted on specific charges of securities fraud, mail fraud, money laundering, selling of unregistered securities, and conspiracy. Sinibaldi, Cuciniello, and Tyrrell raise numerous issues[1] challenging

---

[1] The issues are:
I. Whether the district court abused its discretion in denying the defendants' motions for mistrial after the severance of the case against Schultz (Cuciniello's issue by adoption; Tyrrell's issue by adoption);

2. Whether the district court abused its discretion in allowing the admission of evidentiary rulings including: Miscellaneous Business Records, Abel Flores Reyes' Testimony, Albert Melchoir and expert witness Charles Stutts' testimony, Receiver Gary Lipson's testimony, and Sinibaldi's "RIA" certification status;

3.Whether the district court abused its discretion in declining to substitute juror Bennett with an alternate juror;

4. Whether the district court correctly denied Sinibaldi judgments of acquittal as to the mail fraud and other challenged counts of conviction;

5. Whether the district court correctly denied Sinibaldi a judgment of acquittal as to the conspiracy charged in count one;

6. Whether Sinibaldi was entitled to a new trial based on asserted cumulative error;

7. Whether the district court erred in calculating the loss attributable to Sinibaldi pursuant to U.S.S.G. § 2F1.1 (b)(1) (1998) or plainly err in ordering restitution in the amount of that loss;

8. Whether the district court correctly denied Cuciniello's motions of judgments of acquittal or a new trial;

9. Whether the district court abused its discretion in declining to dismiss the indictment based on alleged prosecutorial vindictiveness;

10. Whether Cuciniello's guidelines-range sentence was unreasonable;

11. Whether the district court correctly denied Tyrrell's motions for judgments of acquittal or a new trial; and

12. Whether the district court erred in failing to declare a mistrial to all defendants when defendant Schultz was severed midway through the trial.

evidentiary rulings, legal rulings, their convictions and the sentences imposed.[2] We affirm.

Factual Background

Millennium Investment, Inc. ("MII") was created for the alleged purpose of helping new businesses become publicly traded companies. Defendants Danny Wey ("Wey") and Gregory G. Schultz ("Schultz") served as officers and directors of MII. Shortly thereafter, Millennium Investment, Inc. Trust ("MIIT") was created to market and sell unregistered notes. The funds raised by MIIT were remitted to MII. Schultz's duties included serving as legal counsel to the Millenium entities, drafting MIIT offering documents, and directing MIIT's fundraising efforts. Wey's duties included identifying

---

[2] Sinibaldi was sentenced to a total of 168 months imprisonment, 36 months of supervised release, and restitution of $5,333,374. Cuciniello was sentenced to total of 210 months' imprisonment, 36 months of supervised release, and restitution of $15,290,601.38. Tyrrell was sentenced to 136 months imprisonment, 36 months supervised release, and restitution of $10,200,307.95.

the investments in which MIIT could place its funds. Although Wey had a criminal background which included a federal conviction of felony fraud offenses, MIIT investors were not so advised despite MIIT disclosure documents with experience profiles for both Wey and Schultz.

Once MIIT commenced its operations, Schultz informed Wey that MIIT notes which matured in less than nine months were exempt from state and federal registration requirements under the "commercial note exemption." Also, several of the notes MIIT issued included a "banker's acceptance" provision stating that the Bank of Bermuda Limited, which is one of the largest banks in the Carribean, would guarantee the notes in the event of default. As was ultimately discovered, this bank had never issued a "banker's acceptance" or any other guarantee to MIIT. In fact, neither the bank nor any of its subsidiaries had ever had a relationship with MIIT, its officials or entities.

Sinibaldi was the top seller at MIIT. For six months, he was involved in fifty-eight MIIT transactions, valued at $1,655,235.68, that purported to be secured by the banker's acceptance provision. He assured investors that MIIT notes were fully secured by the Bank of Bermuda and were a completely safe investment. At first, Sinibaldi received a commission of up to ten percent of any MIIT investments he secured, but in order to evade securities laws, Schultz determined that this compensation should be characterized as "consulting or advisory payments," even though Sinibaldi never offered any marketing or consulting services to the Millenium entities. Over a two year period, Sinibaldi and his company, Delta Financial Services, Inc., received a total of $465,234.47 in cash payments and additional securities from MII (which were sold for about $85,000). From October 1996 to July 1999, individuals invested more than $6 million in MIIT securities; however, by July 1999, MIIT had more than $1 million in past-due notes. Furthermore, despite the fact that MIIT had defaulted on its

obligations in October 1998, defendants falsely informed new investors that MIIT notes offered "good security." By mid-1999, MIIT stopped raising funds.

Defendants then formed the Stonehedge entities. Securities from these entities were marketed through individuals in the financial or insurance business, allegedly to provide funding to companies that were about to make public stock offerings. The Stonehedge offering material stated that "Stonehedge invests their portfolio in a company called Millenium as its vehicle for making the investments." Stonehedge also advised investors that Millennium principals had over 40 years of experience in taking companies public.

From August 1998 to November 1999, Cuciniello incorporated eight Stonehedge entities in Florida. Then in September and October 1999, despite being aware of an ongoing investigation of defendants' fraudulent activities by the Florida Department of

Banking and Finance ("DBF"), Cuciniello incorporated another seven Stonehedge entities in New York. Cuciniello served as an officer of several Stonehedge entities, was an authorized signator for ten Stonehedge-related bank accounts, and participated in seminars to train others to market Stonehedge securities. Between March 1998 and April 2001, Cuciniello and his family received more than $850,000 from Stonehedge entities.

From March 1998 through November 2000, more than $12.5 million was invested in the Stonehedge offerings. Only about twenty percent of this money was invested as represented in the Stonehedge offering materials. However, up to thirty-three percent of these invested funds were paid out as commissions to those involved in the process.

In January 1998, Cuciniello brought co-defendant Robert Phillips ("Phillips') to the Stonehedge program. At a meeting held in Clearwater, Florida, Schultz provided further detail

to Phillips about the program. Phillips then agreed to market the Stonehedge program through his network of insurance agents, West Coast Distributors, Inc. ("West Coast"). Out of every Stonehedge investment placed by Phillips's agents, West Coast would receive a commission of up to twenty-seven percent. In order to evade state and federal securities laws, Schultz told Phillips that these payments must be characterized as "referral fees" rather than "commissions".

In the fall of 1998, Phillips recruited Tyrrell to sell Stonehedge securities. After Tyrrell's involvement in the Stonehedge securities, the funds invested increased dramatically, from approximately $30,000 to $100,000 per month to as much as $1,000,000 per month. His sales organization was the largest of all the sales organizations engaged in the Stonehedge marketing effort. Tyrrell participated in and created a training manual for seminars to train new agents to market Stonehedge securities. Also, Tyrrell was the president,

secretary, treasurer, and sole shareholder of one of the entities -- The Stonehedge Group, Inc. – X, and thus executed the shares of stock issued in connection with this entity.

From March through July 1999, DBF served investigative subpoenas for testimony and documents on MIIT, Sinibaldi, Global Research Internationsl, Inc., and many of the Stonehedge entities. Before responsding to the subpoenas, defendants tried to conceal their fraudulent activities by supplementing MIIT investor files with backdated correspondence, and modifying and supplementing Stonehedge investor files to give them the appearance of conforming to applicable state and federal securities laws.

In October 1999, DBF filed a civil action in Pinellas County, Florida, seeking an injunction and appointment of a receiver to MII, MIIT, various Stonehedge entities, and First Dominion Venture Capital, Inc., and named as "relief defendants"

Schultz, Wey, Cuciniello, and Sinibaldi. The state circuit court granted DBF's requests, entered an injunction, and appointed attorney Gary Lipson as receiver.

The defendants ceased using the Millennium and Florida based Stonehedge entities and turned all of their attention to the New York-based Stonehedge offerings. There they raised more than $3.2 million from November 1999 through November 2000. Despite the millions of dollars raised through the sale of these unregistered securities, Millenium investors lost more than $5.3 million and Stonehedge investors lost more than $11.4 million. Sinibaldi, Cuciniello, and Tyrrell invested none of their money in any of these entities.

After the state circuit court made its rulings, Cuciniello convinced Phillips that the injunction did not prevent him from marketing Stonehedge securities outside of Florida. Thereafter, the Stonehedge sales that Phillips and his agents made

were processed through Tyrrell's Arizona-based company, Innovative Financiai Concepts, LLC ("IFC"). About seven weeks after the injunction was entered, Phillips withdrew from the Stonehedge program.

Before Lipson's appointment, Tyrrell received his commissions from West Coast, through IFC. After the appointment, Tyrrell began to receive his commissions from the New York-based Stonehedge XII entitiy through another Arizona-based company recently registered by his wife – TMT Consulting. Payments to TMT Consulting were typically remitted to IFC.

The jury convicted Sinibaldi on the overarching conspiracy count, two counts of securities fraud, three counts of selling unregistered securities, four counts of mail fraud, conspiracy to commit money laundering, eight counts of engaging in illegal monetary transactions, and seven counts of money laundering. Cuciniello was convicted on the

overarching conspiracy count, one count of securities fraud, three counts of selling unregistered securities, eight counts of mail fraud, conspiracy to commit money laundering, seven counts of engaging in illegal monetary transactions, and seven counts of money laundering. Tyrrell was convicted on the overarching conspiracy count, one count of securities fraud, seven counts of mail fraud, conspiracy to commit money laundering, and seven counts of money laundering. This appeal followed.

Discussion

I. *Defendants' Motions for Mistrial after Severance and Challenge to Standby Counsel*

Schultz originally represented himself *pro se*, but due to apparent health problems, he suffered a blackout and collapsed in court. Because of Schultz's illness and admittance to a hospital, the court appointed stand-by counsel on his behalf. The court explained this change to the jury. On March 16, 2005, because Schultz continued to suffer

tremendous pain and had difficulty concentrating, the district court severed his case and granted him a mistrial.

Appellants first challenge their motion for a mistrial based upon the severance of Schultz from the remainder of the trial. The basis of this argument was the prejudicial effect of the jury's observation of Schultz's apparent health problems. Sinibaldi also challenges the district court's appointment of standby counsel for Schultz. After a thorough review of the record, we conclude that none of these arguments provide any basis for relief.

We review a district court's denial of a severance for abuse of discretion. See *U.S. v. Day*, 405 F.3d 1293, 1297 n. 3 (11th Cir. 2005). First the district court was correct in initially denying a severance because the "general rule is that defendants who are jointly indicted should be tried together, particularly in conspiracy cases." *U.S. V. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005) (citing *U.S. v. Pedrick*, 181 F.3d

1264, 1272 (11th Cir. 1999)). Next, Sinibaldi has no standing to challenge the district court's appointment of Schultz's standby counsel, only Schultz has such standing. The jury observed Schultz's health problems before the appointment of counsel and the court properly explained the appointment to them. The jury was fully instructed to draw no inferences from such. Thus, Sinibaldi's arguments that the jury would have interpreted the appointment as an indication of guilt is without merit and there was no abuse of discretion. Sinibaldi also argues that Schultz's ultimate severance from the trial deprived the remaining defendants of Schultz's assistance in their joint defense. We find this argument frivolous. Schultz was available as a witness, but was never called by anyone.

Sinibaldi argues that the defendants were prejudiced because evidence of events in which only Schultz had been involved was introduced at trial. Because this case involves a conspiracy, all

defendants involved in the conspiracy are liable for the reasonably foreseeable consequences of the conspiracy including the acts of co-conspirators. See *U.S. v. Silvestri*, 409 F.3d 1311, 1335 (11th Cir. 2005); *U.S. v. Alas*, 196 F.3d 1250, 1251 (11th Cir. 1999); *U.S. v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996) ("Hence, a court need not assess the individual culpability of a particular conspirator provided the substantive crime was a reasonably foreseeable consequence of the conspiracy.")(internal quotation marks omitted). The trial court gave the jury clear detailed instructions designed to eliminate any confusion of "prejudicial spillover." The jury was carefully instructed to consider each defendant separately as to each count in the indictment. There was no error.

II. *Defendants' Challenge to the District Court's Evidentiary Rulings*

We review the district court's evidentiary rulings for abuse of discretion. *See U.S. v. Lyons*, 403 F.3d 1248, 1250 (11th Cir. 2005).

A. *Miscellaneous Business Records*

The documents at issue are GX 115-1A– (a copy of the outside cover of a MIIT file concerning investor Jack Overmire), GXs 112G, 115-1-G– (exhibits containing investor correspondence), and GX 35– (past-due MIIT notes pertaining to several investors). According to Wey's testimony, these and a series of other MIIT documents had been created and maintained by the defendants in the ordinary course of their business. Thus because "a trial judge has broad discretion to determine the admissibility of [business record] evidence[,]" the court properly admitted these documents as business records pursuant to Fed. R. Evid. 803(6). *U.S. v. Bueno-Sierra*, 99 F.3d 375, 378 (11th Cir. 1996). These

business records do not violate the Confrontation Clause because none of them are testimonial.[3]

B. *Abel Flores Reyes' Testimony*

Sinibaldi argues that the district court abused its discretion by allowing the former mayor of San Lorenzo, Nicaragua, Abel Flores Reyes, to testify over the defendants' objections, regarding a conversation he had before executing an agreement which purported to establish a business relationship between the 13 government of San Lorenzo and the Millennium and Stonehedge entities. Reyes stated that during this conversation, Claudia Garcia told him that attorneys in Miami, Florida, would provide money to build housing for the impoverished in San Lorenzo if he would execute the agreement at issue. According to Sinibaldi, this testimony was inadmissible hearsay and a violation of the

---

[3] A record would be testimonial if it was "made under circumstances which would lead the declarant to believe the statement would be available for use at a later trial." *U.S. v. Underwood*, 446 F.3d 1340, 1347 (11th Cir. 2006).

Confrontation Clause. We disagree. Reyes' testimony established that no business relationship existed between the government of San Lorenzo and the Millennium and Stonebedge entities. Furthermore, Reyes' testimony about the conversation that prompted him to execute the agreement explained why Reyes had signed it. This challenged testimony was not offered to prove the truth of any matter asserted and therefore it is not hearsay under Fed. R. Evid. 801(c). *See Cargill v. Turpin*, 120 F.3d 1366, 1373 n.15 (11th Cir. 1997) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted," but evidence that is not offered or admitted for its truth is not hearsay) (internal quotation marks omitted). Rather, it was offered to show his mental state and why he signed the document.

C. The testimony of Albert Melchoir and Expert Witness Charles Stutts

Sinibaldi further argues that the district court abused its discretion in allowing Albert Melchoir, an Assistant General Counsel for the State of Florida Office of Financial Regulation, who was primarily responsible for dealing in cases involving securities, to answer questions advanced by Schultz on crossexamination in an "over responsive" manner. Melchoir explained why DBF had sought *ex parte* injunctive relief in October 1999. He stated that as a result of his investigation, he "was certain that Stonehedge had raised about $3 million and were continuing to sell unregistered securities through unregistered agents." The defendants have never disputed that the Stonehedge offerings were unregistered. They had always maintained that they were exempt from registration.

Sinibaldi next argues that Charles Stutts, the United States' securities expert, gave impermissible legal opinions during his testimony. The record convinces us that the district court properly limited the scope of Stutt's testimony, gave the jury

appropriate limiting instructions, instructed the jury on applicable securities law, explained the role of an expert witness, and committed no error.

D. *The Testimony of Receiver Gary Lipson*

Sinibaldi argues that the district court abused its discretion by allowing Gary Lipson, the receiver appointed by DBF, to make "improper commentary," citing comments from Lipson's four days of trial testimony. The district court properly sustained the defendant's objection and instructed the jury to disregard the "improper commentary"[1] the defendant objected to. We assume they did.

D. Sinibaldi's "RIA" Certification Status

[1] During Lipson's cross-examination about a document he had recovered from the defendants, Cuciniello's counsel displayed a portion of the first page of the document on the court's projection system. After some heated questions regarding sections of the document, Lipson made the challenged statement "You're afraid to show the whole page, aren't you?"

Sinibaldi argues that the district court should have excluded as propensity evidence a 1998 Lee County yellow pages advertisement, a 1999 brochure advertising an estate planning seminar, and a business card, in which he falsely held himself out to the public as a registered investment advisor or "RIA." Sinibaldi argues this evidence is inadmissible under Fed. R. Evid. 404(b). However, this evidence demonstrated how Sinibaldi had conducted his fraudulent marketing activities during the charged conspiracies. Furthermore, this evidence was "inextricably intertwined with the evidence of the charged offense[s]," *U.S. v. Herre*, 930 F.2d 836, 837 (11th Cir. 1991), and thus Rule 404(b) does not apply. *See U.S. v. Schlei*, 122 F.3d 944, 989-90 (11th Cir. 1997) (concluding that testimony of defendant's unauthorized use of embassy letterhead to market forged financial instruments was "admissible as intrinsic evidence" of the charged scheme to defraud). Even though none of the Government's witnesses indicated that they had placed particular reliance on this specific misrepresentation in

deciding whether to invest in MIIT notes, this intrinsic evidence remains relevant and admissible. Specific reliance is not required under the federal fraud statutes. *See Neder v. U.S.*, 527 U.S. 1, 24-25, 119 S.Ct. 1827, 1841 (1999). A scheme to defraud must include a material misrepresentation, that is, "one having a natural tendency to influence, or capable of influencing, the decision maker to whom it is addressed." *U.S. v. Hasson*, 333 F.3d 1264, 1271 (11th Cir. 2003), *cert. denied*, 541 U.S. 1056 (2004). Sinibaldi misrepresented that he was a registered RIA, when in actuality he did not even have a high school diploma. This misrepresentation gave the false impression that he possessed a high level of professional expertise and experience capable of influencing potential investors.

III. *Whether the District Court Erred in Declining to Substitute Juror Bennet*

Sinibaldi argues that the district court abused its discretion in declining to substitute an alternate for juror Bennett. Under Fed. R. Crim. P. 24(c), "a trial court may, in the exercise of its sound discretion, substitute an alternate juror for a regular juror who has become unable or disqualified to perform h[er] duties." *U.S. v. Holder*, 652 F.2d 449, 451 (5th Cir. Unit B Aug. 1981)[5]

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial, if not made in pursuance of know rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Remmer v. U.S., 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). "A juror's exposure to extraneous material or influence requires a new trial if the exposure poses a reasonable possibility of prejudice to the defendant." *U.S. v. Khanani*, 502

---

[5] See Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent in the Eleventh Circuit, all decisions of the former Fifth Circuit announced prior to October 1, 1981)

F.3d 1281, 1291 (11th Cir. 2007) (internal quotations marks omitted). To make a such a showing, "a defendant must establish that an extrinsic contact with a jury, in fact, occurred." *Id.* Once this showing is made, "the burden shifts to the government to prove that the extrinsic contact was not prejudicial." *Id.* "The factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's 'large discretion.'" *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1472 (11th Cir. 1992). It must be noted that even though the juror states in her testimony "that the extrinsic information was harmless, [it] is not controlling." *U.S. v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988). "The district court may consider such testimony, but it must also consider other factors such as the nature of the extrinsic evidence and the strength of the evidence properly presented by the government against the defendant." *Id.* (quoting *U.S. v. Chastin*, 198 F.3d 1338, 1351 (11th Cir. 1999)).

Juror Bennett's concern was a result of the lunch break on March 8, 2005. Jurors Williams, Glandt, and Bennett were sitting at a table eating when the defense attorneys arrived and sat at the table next to them. One of the lawyer's chair rubbed against the back of juror Bennett's chair. The jurors then quickly finished their lunch and returned to the courthouse. Immediately thereafter, the court informed the defense that juror Williams had told the bailiff that she had a concern about members of the defense who sat near her during the lunch break. During *voir dire*, the district court properly questioned whether any of the jurors had overheard anything said by the attorneys or anyone else at their table in the restaurant. They all responded in the negative. The court then prohibited the parties, counsel, and witnesses from eating lunch in a portion of the area surrounding the courthouse and separated them from the jury.

The next day, juror Bennett addressed the district court stating that she did not hear what the

attorneys were talking about in the restaurant. The jurors were already eating when the defense attorneys chose to sit next to them. She further stated that her stress was because she had been instructed that jurors were not supposed to be close to the attorneys on the case and that the attorneys in the restaurant were "too close for comfort." She had the utmost respect for the court and wanted "to do the right thing" for everyone by reporting what had happened. Juror Bennett further explained that she was stressed due to physical exhaustion from commuting to and from the courthouse and performing her regular job responsibilities after trial each day. Consequently, the court accommodated her by allowing her to stay in a Tampa hotel any night she wanted to rest. The court then assured juror Bennett that the restaurant incident would not be repeated, and that if in the future she felt that she could not continue with her demands as a juror, she should immediately tell the court. Juror Bennett affirmed that she felt better about the situation. We believe these measures immediately resolved the

situation. Based on the foregoing, the district court committed no error by allowing juror Bennett to remain on the panel.

IV. *Defendants' Motion for Acquittal on Mail Fraud and Other Challenged Counts of Conviction*

We review *de novo* the district court's denial of a motion for judgment of acquittal and view the evidence in the light most favorable to the verdict. *U.S. v. Byrd*, 403 F.3d 1278, 1288 (11th Cir. 2005). "A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of evidence." *Id.*

"To prove mail fraud, the Government must show that the defendant (1) intentionally participated in a scheme to defraud and (2) used the mails to execute the fraudulent scheme." *U.S. v. Suba*, 132 F.3d 662, 673 (11th Cir. 1998). "The Government must establish only that the fraudulent scheme existed" and circumstantial evidence of criminal intent can be sufficient. *Id.* Furthermore, "[p]roof of a routine

practice of using the mail to accomplish a business end is sufficient to support a jury's determination that mailing occurred in a particular instance." *U.S. v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995).

We find that there is sufficient evidence to prove use of the mails as to mail fraud counts ten and twelve on which Sinibaldi was convicted. These two counts concern MIIT investor Bernard Freund ("Freund"). Robert Freund, Freund's grandson, testified that the election form included with the letter that is the subject of count ten had been completed by Freund, and also both that letter and the letter that is the subject of count twelve had Freund's home address at the time. The form and substance of these letters is sufficient evidence to support the inference that they were mailed. Furthermore, there is evidence that Millennium entities typically had communicated with investors through the mail.[6]

---

[6] Sinibaldi testified in a sworn statement that the Millenium entities' "standard procedure was to send documents to and

Sinibaldi further argues that the Government did not prove numerous overt acts alleged in count one concerning the investment returns Sinibaldi falsely had advised Millennium investors they could anticipate. However, for a defendant to be convicted of a conspiracy to defraud pursuant to 18 U.S.C. § 371, the government was only required to prove "an" overt act, not every overt act alleged. *See U.S. v. Ellington*, 348 F.3d 984, 989 (11th Cir. 2003). There is direct evidence of overt acts alleged in the paragraphs Sinibaldi is not now challenging. The record also discloses circumstantial evidence supporting the overt acts in question. The testimony of several investors made clear that Sinibaldi had falsely represented that their MIIT notes would produce a twelve percent profit plus a five percent bonus. This argument fails.

---

receive documents from investors through mail. Also, Dan Wey testified that the Millenium entities typically had communicated with investors through mail. Furthermore, numerous investors testified that the Millenium entities had communicated with them through mail.

V. *Defendants' Motion for Acquittal on the Conspiracy Charged in Count One*

This Court narrowly reviews an argument that the evidence failed to prove a single, overarching conspiracy and "may reverse a jury's finding that a single conspiracy existed only if the evidence, viewed in the light most favorable to the verdict, could not permit reasonable jurors to have found, beyond a reasonable doubt, that there was a single conspiracy." *U.S. v. Anderson*, 326 F. 3d 1319, 1327 (11th Cir. 2003) (quoting *U.S. v. Taylor*, 17 F.3d 333, 337 (11th Cir. 1994). Sinibaldi argues that Millenium and Stonehedge offerings evidenced two separate conspiracies, rather than a single, overarching conspiracy. "Three relevant factors determine whether a single conspiracy existed: (1) whether there was a common goal, (2) the nature of the scheme, and (3) the overlap of the participants." *Id.* "If the proof shows the defendant knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played

a very minor role in the overall scheme." *Suba*, 132 F.3d at 672 Furthermore, "[a] single conspiracy may be found where there is a 'key man' who directs the illegal activities, while various combinations of other people exert individual efforts toward the common goal." *Taylor*, 17 F.3d at 337 (quoting *U.S. v. Gonzalez*, 940 F.2d 1413, 1422 (11th Cir. 1991).

All of these factors are satisfied here. Among other things, the defendants marketed an array of Millennium and Stonehedge offerings, whose common goal was raising funds through the sale of unregistered securities that allegedly would pay interest or other periodic monetary distributions. Furthermore, examples of overlapping included the "Due-Diligence Worksheet" provided to Stonehedge investors, which portrayed MIIT and Schultz as responsible for "help[ing] selected companies go public" and Phillips, Tyrrell, and their respective companies, as responsible for marketing the Stonehedge offerings. Finally, the district court properly instructed the jury on single versus

multiple conspiracies. There is ample support for the jury's finding that Millenium and Stonehedge offerings were part of a single, unified conspiracy.

VI. *Defendant's Claim of a Cumulative Effect of Errors*

We review any errors preserved for appeal, as well as any plain errors, to determine whether the defendant's substantial rights were affected. *See U.S. v. Adams*, 74 F.3d 1093, 1099-1100 (11th Cir. 1996). Sinibaldi argues that the "cumulative effect" of the errors he has alleged on appeal warrants a new trial. "We have held that the cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible." *U.S. v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995) (internal quotation marks omitted). As discussed above, the district court did not err as Sinibaldi contends; therefore, no cumulative errors

exist. *See U.S. v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004).

VII. *Whether the District Court Erred in its Calculation of Loss Pursuant to U.S.S.G. §2 F1.1(b)(1)*

Sinibaldi contends that the district court erred in its calculation of the $5,333,374 loss attributed to him and its order of restitution of the same amount. We agree with the district court in holding Sinibaldi responsible for all of the losses attributed to the conspiracy. *See U.S. v. Odom*, 252 F.3d 1289, 1299 (11th Cir. 2001) (explaining that in calculating restitution, "a defendant convicted of participation in a conspiracy is liable not only for her own acts, but also those reasonably foreseeable acts of others committed in furtherance of the conspiracy."); *U.S. v. Dabbs*,, 134 F.3d 1071, 1081 (11th Cir. 1998) ("The calculation of loss for purposes of section 2F1.1 is not an exact science. [Under U.S.S.G. §2F1.1 cmt., n.8 (1994)] The loss need not be determined with

precision. The court need only make a reasonable estimate of the loss, given the available information.")[7]. The evidence supports the calculation made in this regard and, indeed the sum could have been much larger.

VIII. *Cuciniello's Motions for Judgments of Acquittal or a New Trial*

Cuciniello specifically argues that at the close of the evidence in the Government's case-in-chief, prosecutors had failed to establish ill will, or criminal intent on the part of Appellant. This argument is without merit. "The Government need not produce direct proof of scienter in a mail fraud case . . . circumstantial evidence of criminal intent can suffice." *U.S. v. Hawkins*, 905 F.2d 1489, 1496 (11th Cir. 1990). In fact, "[g]uilty knowledge can rarely be established by direct evidence, especially in respect to fraud crimes which, by their very nature,

[7] We note that § 2F1.1 has been rolled into § 2B1.1 effective November 1, 2001, however, that change does not affect our discussion of the claims being made in this case

often yield little in the way of direct proof." *Suba*, 132 F.3d at 673. Among other things, Cuciniello incorporated eight of the sixteen Stonehedge entities, was an officer in many of these entities, including being President of the Stonehege Group, Inc., was an authorized signator for ten separate Stonehedge-related bank accounts, was a cardholder of two Stonehedge-related American Express accounts, recruited codefendant Robert Phillips into the defendants' scheme providing him with guidance after DBF initiated its investigation into the defendants' Florida-based operations, and profitted from the sale of MIIT securities without ever investing his own money into any securities. Because the evidence established that Cuciniello actively participated in the organization and operation of the defendants' fraudulent investment scheme, the district court was correct in denying Cuciniello's motions for judgments of acquittal or a new trial.

IX. *Defendants' Motion to Dismiss Based on Prosecutorial Vindictiveness*

We review the district court's denial of a motion to dismiss an indictment based on alleged prosecutorial vindictiveness for abuse of discretion. *See U.S. v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006). In May 2001, the United States sent Cuciniello and his co-defendants letters informing them that they were targets of a pending grand jury investigation. On October 29, 2002, Schultz began a civil class action lawsuit seeking more than $300,000,000 in damages against several of the state and federal agencies and individuals involved in the investigation of the defendants' fraudulent investment scheme, including one of the federal prosecutors assigned to handle this case. Then, on December 10, 2002, the grand jury returned a superseding indictment, adding charges and defendants, including Cuciniello, to the existing indictment. Cuciniello then filed a motion to dismiss the indictment for prosecutorial vindictiveness because the United States had allegedly sought the superseding indictment in retaliation for the civil action Schultz had filed. Because "[a]s a general

rule, the courts are not free to interfere with the prosecuting officer's discretionary decision to prosecute crime," *U.S. v. Spence*, 719 F.2d 358, 361 (11th Cir. 1983), and because it is clear in the record that the grand jury investigation that resulted in the indictment in this case was begun before Schultz filed his class action lawsuit, *see U.S. v. Corona*, 849 F.2d 562, 567-68 (11th Cir. 1988) (prosecutorial vindictiveness claim fails when government's investigation preceded defendant's exercise of procedural rights), there is no evidence of prosecutorial vindictiveness.

X. *Cuciniello's challenge to the guidelines-range sentence*

"We review the length of a sentence for reasonableness in light of the facts and circumstances of the defendant's case reflecting the sentencing considerations in [18 U.S.C.] § 3553(a)." *U.S. v. Williams*, 456 F.3d 1353, 1363 (11th Cir. 2006); *see U.S. v. Thomas*, 446 F.3d 1348, 1351 (11th

Cir. 2006). This review for reasonableness is deferential and the weight accorded to any § 3553(a) factor is up to the discretion of the district court. *Williams*, 456 F.3d at 1363. Cuciniello argues that the massive sentence imposed by the district court was not necessary. The party who challenges the sentence has both the burden of showing that the sentence is unreasonable and the initial burden of establishing that the district court considered an impermissible factor at sentencing. *See id.* at 1361. When reviewing a sentence for reasonableness, this Court must evaluate whether the sentence achieves the purposes of sentencing set out in 18 U.S.C. § 3553 (a)(2)(B) & (C). *Id.* Here, Cuciniello has not identified a section 3553 factor that would support a lesser sentence. Furthermore, because among other things, Cuciniello violated the terms of his pretrial supervised release by attempting to market another investment scheme while on pretrial release, and after a review of the entire record, Cuciniello's 210-month sentence was not unreasonable. The sentence was required to "afford adequate deterrence to

criminal conduct" and to "protect the public from further crimes of the defendant." 18 U.S.C. § 3553 (a)(2)(B) & (C).

XI. *Arguments waived because they were not properly raised-and supported-in Cuciniello's brief*

Cuciniello concludes his brief as follows: "Cuciniello reasserts here any and all objections made at trial, including, but not limited to the basis for his mistrial, severance, and new trial motions, as stated at the district court level." Because Cuciniello has failed to identify and support these putative arguments in his brief (other than by incorporating by reference the entire record in this case), he has waived them. *See Kelliher v. Veneman*, 313 F.3d 1270, 1274 n.3 (11th Cir. 2002).

XII. *Tyrrell's Motions for Judgments of Acquittal or a New Trial*

We review the district court's denial of a Motion for Judgment of Acquittal *de novo*. *See U.S. v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). We review the district court's denial of a Motion for a New Trial for abuse of discretion. *See U.S. v. Ward*, 274 F.3d 1320 (11th Cir. 2001). Tyrrell argues that his Motion for Acquittal "was premised on the Government's failure to prove scienter in support of the various conspiracy claims raised against him." Tyrrell also argues that "[t]he evidence adduced at Trial did not include any direct or circumstantial evidence of Mr. Tyrrell's knowing participation in an agreement to defraud." Because an abundance of evidence adduced at trial proved Tyrrell's knowing and voluntary participation in the charged conspiracies and because the existence of a conspiracy may be proven by circumstantial evidence, *see U.S. v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002), we hold that the district court correctly denied Tyrrell's motions for judgments of acquittal or, in the alternative, for a new trial.

Conclusion

For the foregoing reasons, the challenged convictions and sentences are **AFFIRMED**.

COPY

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14492-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GENE A. TYRRELL,
DEAN A. SINIBALDI,
JOSEPH CUCINIELLO,

Defendants-Appellants.

(Filed June 09, 2008)

On Appeal from the United States District Court for
the Middle District of Florida

ON PETITION (S) FOR REHEARING AND
PETITION (S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, CARNES and FAY, Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ PETER FAY

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAY 13 2009
OFFICE OF THE CLERK

128 (2)

No. 08-910

In the Supreme Court of the United States

GENE A. TYRRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's convictions for conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), and for money laundering, in violation of 18 U.S.C. 1956(a)(1)(A), should be set aside based on an alleged failure by the government to establish that the "proceeds" involved in the laundering transactions were "profits" of the underlying unlawful activity.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Anker Energy Corp. v. *Consolidated Coal Co.*, 177 F.3d 161 (3d Cir.), cert. denied, 528 U.S. 1003 (1999) 8

Bousley v. *United States*, 523 U.S. 614 (1998) 6

Gregg v. *Georgia*, 428 U.S. 153 (1976) 7

Grutter v. *Bollinger*, 539 U.S. 306 (2003) 7

King v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991), cert. denied, 505 U.S. 1229 (1992) 7

Marks v. *United States*, 430 U.S. 188 (1977) 7

Nichols v. *United States*, 511 U.S. 738 (1994) 7

Sinbaldi v. *United States*, 129 S. Ct. 663 (2008) 6

United States v. *Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003), cert. denied, 540 U.S. 1104 (2004) 7

United States v. *Brown*, 553 F.3d 768 (5th Cir. 2008) 9

United States v. *Johnson*, 467 F.3d 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007) 8

United States v. *Olano*, 507 U.S. 725 (1993) 9

United States v. *Santos*, 128 S. Ct. 2020 (2008) 5, 6, 7, 8, 9, 10

Statutes: Page

18 U.S.C. 371 1
18 U.S.C. 1341 2
18 U.S.C. 1955 ..... 5, 7
18 U.S.C. 1956 6
18 U.S.C. 1956(a)(1) 5, 6
18 U.S.C. 1956(a)(1)(A) 2, 3
18 U.S.C. 1956(a)(1)(A)(i) 5, 6
18 U.S.C. 1956(h) 2, 3
28 U.S.C. 2255 6

In the Supreme Court of the United States

No. 08-910

GENE A. TYRRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-42) is not published in the Federal Reporter but is available at 269 Fed. Appx. 922.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on June 9, 2008 (Pet. App. 43-44). The petition for a writ of certiorari was filed on September 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to commit fraud, in violation of 18 U.S.C. 371, seven counts of mail fraud, in vio-

lation of 18 U.S.C. 1341, conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), and seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). He was sentenced to 136 months of imprisonment. The court of appeals affirmed. Pet. App. 1-42; see Gov't C.A. Br. 4.

1. Danny Wey and Gregory Schultz created a company named Millennium Investment, Inc., and a related entity Millennium Investment, Inc. Trust (MIIT), which marketed and sold unregistered securities to raise capital for Millennium. The MIIT notes falsely claimed that they were guaranteed by the Bank of Bermuda Limited, and MIIT's disclosure documents neglected to mention Wey's prior felony fraud conviction. Dean Sinibaldi marketed many of these notes for MIIT. Pet. App. 4-6.

When MIIT began defaulting on its obligations, its owners and Joseph Cuciniello incorporated a group of 15 Florida and New York entities known as The Stonehedge Group (Stonehedge). Stonehedge's marketing materials advised that its funds would be invested in Millennium and falsely claimed that Millennium's principals had 40 years of experience in providing funds to companies about to make initial public stock offerings. Between March 1998 and November 2000, victims turned over more than $12.5 million to Stonehedge. Although petitioner represented that 85% of that money would be invested, only approximately 20% was actually invested, and 33% was paid in commissions to petitioner and others who sold the Stonehedge securities. Pet. App. 6-8; see Presentence Investigation Report 4 (PSR).

Petitioner began marketing Stonehedge securities in the fall of 1998. He created a training manual and instructed new salesmen at seminars. After petitioner and the sales organization that he headed became involved,

the monthly funds invested in Stonehedge increased from less than $100,000 to approximately $1 million. Petitioner also became the president and sole shareholder of one of the Stonehedge entities. In that capacity, he signed and issued $491,000 worth of stock shares to investors, most of which they ultimately lost. Pet. App. 9-10; Gov't C.A. Br. 11-12.

In October 1999, Florida officials sought an injunction to shut down MIIT and Stonehedge, naming Schultz, Wey, Cuciniello, and Sinibaldi as relief defendants. Petitioner and his co-conspirators then began marketing their securities through Stonehedge entities based in New York and processing sales through petitioner's Arizona-based company. At the same time, petitioner directed that his Stonehedge commissions be paid to an entity recently registered by his wife, which then remitted the commissions to an entity he controlled. Even after the state court injunction, petitioner and his co-conspirators collected $3.2 million from investors. In total, Stonehedge investors lost $11.4 million. Pet. App. 10-12.

2. Petitioner, along with Schultz, Sinibaldi, Cuciniello, and others, was first indicted in December 2002 and charged again in a second superseding indictment in November 2004. See Pet. C.A. Br. 2-3. As relevant here, that indictment charged petitioner in Count 23 with conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), and in Counts 32 through 38 with money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). Second Superseding Indict. 25-32, 35-36.

Each of the substantive money laundering counts alleged that petitioner and the other conspirators had conducted a financial transaction involving the "proceeds of specified unlawful activity, that is mail

fraud, * * * with the intent to promote the carrying on of specified unlawful activity." Second Superseding Indict. 35. Each of those counts involved lulling payments made to earlier investors using funds fraudulently obtained from later investors. For example, Count 32 involved a "dividend" payment sent to an investor in January 1999 accompanied by a letter advising that Stonehedge was "looking forward to fantastic growth in the coming year." Gov't Exhs. 217B, 217C. The conspiracy count was likewise predicated in part on an agreement by petitioner and his co-defendant to withdraw "proceeds of victim checks" and to use those "new investor funds to make principal and interest payments to prior investors." Second Superseding Indict. 26-27.

3. On appeal, petitioner (together with Sinibaldi and Cuciniello) argued that a mistrial should have been declared when co-defendant Schultz was severed from the case mid-trial and that the government had failed to prove scienter. Pet. App. 2 n.1, 41. At no point did petitioner argue to either the district court or the court of appeals that the funds involved in the money laundering counts were not "proceeds." See Pet. 10 (petitioner's concession that he made no such argument in the courts below).

The court of appeals affirmed petitioner's convictions. It concluded that no evidence admissible only against Schultz had been admitted and that the court's instructions eliminated any risk of prejudice from the failure to sever Schultz until the middle of the trial. Pet. App. 13-16. The court further found that "an abundance of evidence adduced at trial proved [petitioner's] knowing and voluntary participation in the charged conspiracies." *Id.* at 41.

4. Petitioner and his co-defendants filed petitions for rehearing. On June 2, 2008, while those petitions were pending, this Court held in *United States* v. *Santos*, 128 S. Ct. 2020 (2008), that, to establish promotional money laundering in violation of Section 1956(a)(1)(A)(i) based on transactions involving the "proceeds" of an illegal gambling business, in violation of 18 U.S.C. 1955, the government must prove that the transactions involved the profits, rather than the gross receipts, of the business.

Thereafter, Sinibaldi filed a motion for rehearing or in the alternative to file a supplemental brief pursuant to *United States* v. *Santos*. Petitioner did not file any motion based on *Santos*. The court of appeals denied the petitions for rehearing and denied Sinibaldi leave to supplement his petition to raise a new issue.

ARGUMENT

Petitioner contends (Pet. 5-20) that this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of *United States* v. *Santos*, 128 S. Ct. 2020 (2008). Petitioner further contends that his money laundering convictions are invalid because the government failed to prove that the "proceeds" involved in the laundering transactions were "profits" of the underlying fraud. Pet. 15-16. Those challenges are not properly before this Court, and they lack merit in any event. Accordingly, the Court should deny the petition for a writ of certiorari.

1. Petitioner did not properly preserve for this Court's review any challenge to his convictions based on the meaning of "proceeds" in 18 U.S.C. 1956(a)(1), which was at issue in this Court's decision in *Santos*. Peti-

tioner argued in the courts below only that he did not knowingly participate in a conspiracy to defraud investors. He made no argument based on the meaning of the term "proceeds" in Section 1956(a)(1), and the court of appeals did not address that issue. Unlike his co-defendant Sinibaldi, petitioner did not even attempt to raise a *Santos* argument while his petition for rehearing was pending before the court of appeals. Indeed, petitioner concedes that he failed to raise any *Santos* argument in the courts below. See Pet. 10. That default should preclude review here. If petitioner believes that his conduct did not amount to money laundering in light of *Santos*, then his proper recourse is to file a motion for collateral relief under 28 U.S.C. 2255, where he could attempt to make the factual showing of actual innocence necessary for him to overcome his procedural default. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998).

Like petitioner, Sinibaldi filed a petition for a writ of certiorari with this Court, arguing in part that his money laundering convictions were precluded by *Santos*. Pet. at 16-17, *Sinibaldi* v. *United States* (No. 08-590). This Court denied Sinibaldi's petition for a writ of certiorari. *Sinibaldi* v. *United States*, 129 S. Ct. 663 (2008). The Court should deny the instant petition as well.

2. Even if petitioner's claim based on *Santos* were properly presented, it would not warrant relief at this time. Contrary to petitioner's suggestion (Pet. 4), *Santos* did not hold that "proceeds" universally means "profits" in Section 1956. No opinion in *Santos* spoke for the majority of the Court. The result in *Santos* was that, in order to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) in which the government alleges that the

defendant laundered the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, the government must prove that the alleged laundering transactions involved the profits, rather than the gross receipts, of the business. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Because of the fractured nature of the decision, however, *Santos* does not resolve the meaning of "proceeds" as applied to other forms of "specified unlawful activity" (SUA). Because petitioner's convictions rest on a different predicate SUA than the one involved in *Santos* (mail fraud rather than operating an illegal gambling business), *Santos* is not controlling here.

The general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). As this Court has recognized, however, the *Marks* test is frequently "more easily stated than applied." *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003); *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994). In some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Ibid.* (concluding that it was "not useful to pursue the *Marks* inquiry").

Where there is no "one opinion [that] can meaningfully be regarded as 'narrower' than another" in the sense that it is a "logical subset of other, broader opinions," the traditional *Marks* analysis does not apply. *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S.

1229 (1992)), cert. denied, 540 U.S. 1103 (2004); *e.g.*, *United States* v. *Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-170 (3d Cir.), cert. denied, 528 U.S. 1003 (1999). In such a case, it may be possible to find a legal theory shared by a majority of the Justices by looking to a combination of the plurality or concurring opinions and the dissent. See, *e.g.*, *Johnson*, 467 F.3d at 64-66. But where that inquiry also proves unavailing, then "the only binding aspect of [the] splintered decision is its specific result." *Anker Energy Corp.*, 177 F.3d at 170.

That is the situation with *Santos*. Although the plurality opinion suggests that Justice Stevens's concurring opinion rests on a narrower ground, 128 S. Ct. at 2031, neither Justice Stevens's opinion nor the plurality opinion is a "logical subset" of the other. The plurality opinion rests on a rationale that "proceeds" has a single meaning for all SUAs, and that meaning is "profits." See *id.* at 2029-2030. Justice Stevens's opinion is based on the rationale that "proceeds" has a different meaning for different SUAs. *Id.* at 2033. Neither opinion is a logical subset of the other or can provide a common denominator because the opinions rest on inconsistent premises. Similarly, neither opinion can be combined with the reasoning of the dissent to generate a controlling legal principle because the dissent concludes that "proceeds" always means "gross receipts." *Id.* at 2044. The dissent thus rejects both Justice Stevens's premise that "proceeds" has different meanings for different SUAs and the plurality's conclusion that "proceeds" means "profits." See *ibid.* Accordingly, the only binding aspect of the *Santos* decision is its specific result, which does not address the circumstances of petitioner's case.

See *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("The precedential value of *Santos* is unclear outside the narrow factual setting of the case.").

Because *Santos* does not clearly resolve the meaning of "proceeds" for petitioner's case, *Santos* would not entitle petitioner to any relief even if his claim were properly presented. As noted above, petitioner did not raise a *Santos* claim in the district court. Accordingly, his claim would be subject (at most) to review for plain error, and he would be entitled to relief only if he could show, among other things, that the district court committed an "obvious" error. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Given the uncertainty about whether the "profits" requirement applies to petitioner's offenses, petitioner could not make that showing.

3. Even if the "profits" requirement clearly applied in this case, the transactions in *Santos* are distinguishable from those involved here. In *Santos*, the charged financial transactions consisted of payments of winning bettors and runners' salaries using the proceeds of an illegal lottery operation. Members of the Court concluded that the "profits" definition of "proceeds" was necessary to avoid treating the payment of such "normal" or "essential" expenses of a gambling business as money laundering. *Santos*, 128 S. Ct. at 2027 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Those Justices were concerned that, if the money laundering statute covered paying the essential expenses of the underlying crime, then the money laundering charge would "merge[]" with the proceeds-generating crime (yet produce a higher penalty), *id.* at 2026-2028 (plurality opinion), so that a separate conviction for money laundering would be tantamount to a second con-

viction for the same offense, *id.* at 2032-2033 (Stevens, J., concurring in the judgment).

This case does not present the merger problem that concerned the Court in *Santos* because the transactions underlying the money laundering charges against petitioner did not involve the payment of "essential" expenses of the fraudulent scheme. As noted above, the money laundering charges against petitioner alleged that the conspirators deposited the proceeds of victims' checks into bank accounts and then used those proceeds to make payments to earlier investors, lulling them into believing their funds had been invested and thus promoting the continuation and expansion of the fraud. Such expenditures, unlike, for example, the cost of producing and mailing the fraudulent notes and marketing materials, were not "essential" expenses of the fraud operation. Indeed, the vast majority of later investors never received any lulling payments, so those payments cannot be deemed essential to the scheme. Accordingly, petitioner errs in contending that his transactions, by definition, cannot qualify as transactions in "profits" under *Santos*.

Petitioner's related contention (Pet. 16) that the government failed to prove that the underlying fraud generated profits is belied by the record. Stonehedge raked in $12.5 million in approximately two years, and a third of those funds were paid out as commissions. Pet. App. 8. Sinibaldi received $465,234.47, and Cuciniello and his family received more than $850,000. *Id.* at 6, 8. Petitioner too received sizable payments for selling the fraudulent Stonehedge securities. See PSR 4; Gov't C.A. Br. 14; Gov't Exh. 1S (detailing payments of more than $1.3 million to corporations controlled by petitioner and his wife). Those payments could not have been

made if the scheme's receipts had been completely consumed by its expenses. Accordingly, at this stage of the case, petitioner cannot establish that the charged transactions involved only the gross receipts of fraud, rather than the profits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DAVID E. HOLLAR
Attorney

MAY 2009

Supreme Court, U.S.
FILED
JUN 9 - 2009
OFFICE OF THE CLERK

No. 08-910

IN THE

SUPREME COURT OF THE UNITED STATES

GENE A. TYRRELL – PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Gene A. Tyrrell, Reg. No. 80041-008
Federal Prison Camp
P.O. Box 5000
Florence, Colorado 81226-5000
No Phone Number
PETITIONER PRO SE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT..... 5

CONCLUSION 14

TABLE OF AUTHORITIES

CASES Page

CONNOR v FINCH, 431 US 407 (1977)..... 5

DAVIS v UNITED STATES, 417 US 333 (1974) 6

KENNMORE v UNITED STATES, 2008 WL 4965948 (E.D.Tex. November 17, 2008)... 9

NICHOLS v UNITED STATES, 128 L.Ed.2d 745 (1994)..... 4

UNITED STATES v BAKER, 2008 WL 4054998 (E.D.Mich. August 27, 2008)..... 12

UNITED STATES v FLEMING, 2008 WL 3824752 (3RD Cir. 2008) 9

UNITED STATES v GRASSO, 381 F.3d 160, (3RD Cir. 2004)..... 12

UNITED STATES v HEDLUND, 2008 WL 4183958 (N.D.Cal. September 9, 2008)..... 9

UNITED STATES v LEE, 558 F.3d 638 (7th Cir. 2009) 12

UNITED STATES v MARTINELLI, 454 F.3d 1300 (11TH Cir. 2006)..... 5

TABLE OF AUTHORITIES - Continued

CASES Page

UNITED STATES v POULSEN, 568 F. Supp.2D 885 (S.D.Ohio 2008)..... 12

UNITED STATES v PRINCE, 2008 WL 4861296 (W.D.Tenn. November 7, 2008)..... 9

UNITED STATES v SHELBURNE, 563 F.Supp.2d 601 (W.D.Va 2008)..... 12

UNITED STATES v SANTOS, 128 S.Ct.2020 (2008) ..... *Passim*

UNITED STATES v YUSUF, 529 F.3d 172 (3rd Cir. 2008)..... 12

WOFFORD v SCOTT, 177 F.3d 1236 (11th Cir. 1999) 5

STATUTES

18 U.S.C § 371

18 U.S.C § 1952

18 U.S.C § 1956

United States Federal Sentencing Guidelines:

2B1.1 (a) (1)

Rules:

S.Ct. Rule 1

Respondent appears to argue the following points in opposition to Petitioner's claims:

1. Petitioner cannot raise his *SANTOS* claim because it was not raised in the lower courts. (Opposition Brief at 5).

2. There is no way to determine what this Court really said in *SANTOS* because there was no "common denominator or 'narrowest grounds' that represents the Court's holding." (Opposition Brief at 7, quoting *NICHOLS v UNITED STATES*, 128 L.Ed.2d 745, 753 (1994), which made the remark in the context of there being some "Courts of Appeals [which] have decided this).

3. If *SANTOS* applied in the instant case at all, it would only apply to "essential expenses", not "normal expenses" of operating the alleged illegal business. (Opposition Brief at 9).

ARGUMENT

1. The Petitioner is not barred from raising the application of a new Supreme Court substantive statutory holding.

Petitioner was precluded from raising this issue in the lower court because prior to this Court's decision in *SANTOS*, the Eleventh Circuit clearly held that money laundering (as charged against Petitioner) was legal. In *UNITED STATES v MARTINELLI* 454 F.3d 1300, 1318 (11th Cir. 2006), the court said "[I]n cases where, when a business as a whole is illegitimate, even individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge". It would have been futile for the Petitioner to have raised this issue.

When dealing with an attempt to raise a substantive statutory holding after a petitioner had used his one bite of the apple in § 2255, the court in *WOFFORD v SCOTT*, 177 F.3d 1236, 1244 (11th Cir. 1999), said that where "circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion", it could even be raised in a § 2241 petition.

In *CONNOR v FINCH* 431 U.S. 407, 421 n.19[9b], this court said that it "has the authority and the

duty in exceptional circumstances to notice federal court errors to which no exception has been taken, when they seriously affect the fairness, integrity or reputation of public judicial proceedings".

In *DAVIS v UNITED STATES*, 417 U.S. 333, 346, this Court said:

> "[If...Davis' conviction and punishment are for an act that the law does not make criminal...; [t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances..." (Internal quote marks and brackets deleted)

For all the above reasons, the Petitioner should not be procedurally barred from raising this claim notwithstanding; a miscarriage of justice would result.

2. Irrespective of the "fractured" opinion of the Court in *UNITED STATES v SANTOS*, there were common grounds accepted by at least five Justices of this Court.

In the plurality opinion, Justice Scalia said that "proceeds" means "profits" when there is no legislative history to the contrary." (*SANTOS*, 170 L.Ed.2d 912, 926), while Justice Stevens, on the other hand, said that this was not his view, that it was "the purest of dicta". (*Id.* at 929, n.7)

Whereas there exists this difference, it is important to note that Justice Stevens said,

> "my conclusion rests on my conviction that Congress could not have intended the perverse result that the dissent's rule would produce if its definition of 'proceeds' where applied to an unlicensed gambling business. In other application of the statute **not involving such a perverse result**, I would presume that the legislative history summarized by Justice Alito reflects the intent of Congress." *Ibid.* (Emphasis added)

Hence, it appears that it is the "perverse result" which dictates those instances where "proceeds" means "profits". In those situations, Justice Stevens supports the Plurality opinion that "proceeds" means "profits". Hence, it is necessary to examine the result of the addition of money laundering charges to the mail fraud alleged, (which "Congress...had duly considered and appropriately punished elsewhere in the Criminal Code") (*Id.* at 922), in order to see whether Justice Stevens' concurrence leads to the "profits" definition in the instant case.

Petitioner was charged with mail fraud in violation of 18 USCS § 1341. The loss attributable to him was set by the jury in the amount of $2.5 million. The U.S.S.G. §2B1.1(a)(1) sets the Base Offense Level (BOL) at 7, plus the enhancement for the dollar amount of $2.5 million or less at 16, for a total of 23.

with a BOL range in Criminal History Category I of 46 to 57 months. Yet, due to the addition of money laundering, Petitioner received a 136 month sentence. In this light, Petitioner's sentence was as much as three times what the mail fraud on its own would justify, certainly this falls within the definition of "perverse result", and Justice Stevens agreed in that case, "proceeds" means "profits".

Additionally, all nine Justices agreed that there was a merger problem. (*SANTOS* 170 L.Ed.2d at 922) (Plurality opinion); at 928 (Justice Stevens' concurring opinion); at 929 (Justice Breyer's dissenting opinion); and at 940-941 (dissenting opinion of Justice Alito). However, Justice Alito suggests a way of dealing with it under the "advisory" nature of the Guidelines after Booker, but Justice Stevens correctly points out that this wouldn't help *Santos*.

Moreover, there is the question as to whether a word can mean two different things in its application under the same statute. Justice Stevens said yes. (Id. At 926-928), however, eight Justices disagreed. Id. At 925 (Plurality opinion); see also, Id. 941 ("The meaning of the term 'proceeds' cannot vary from one money laundering case to the next"), (dissenting opinion of Justice Alito).

Lower courts all over the country have taken different positions on this question. Some say that "the narrow holding in *SANTOS* is that 'proceeds' means "profits" where the specified unlawful activity

(SUA) is the operation of an illegal gambling business". (*UNITED STATES v PRINCE*, 2008 WL 4861296 (W.D.Tenn. Nov. 7, 2008)). In *UNITED STATES v FLEMING*, 2008 WL 3824752 (3rd Cir. August 15, 2008), that court said that *Santos* had no effect on the definition of "proceeds" where the SUA is drug sales. In *KENNEMORE v UNITED STATES*, 2008 WL 4965948 (E.D.Tex., November 17, 2008), that court said that *SANTOS* did not hold that financial transactions conducted with receipts from embezzlement is a nonexistent offense".

However, it appears that far more courts have held otherwise. One of the best reasoned opinions Petitioner has seen is that of *UNITED STATES v HEDLUND*, 2008 WL 4183958 (N.D. Cal. September 9, 2008) (D. Lowell Jensen, Senior District Judge):

> "Justice Stevens finds that..." I cannot agree with the plurality that the rule of lenity must apply to the definition of 'proceeds' for [sale of contraband and crime syndicates]. (*Id.*, [128 S.Ct.] at 2032 n.3. It seems clear to this Court that the contraband sales of type of SUA described by Justice Stevens would include all offenses related to drug trafficking, including the marijuana cultivation offense defendant pleaded guilty to...
>
> "There is a good deal of discussion in *SANTOS* about a 'merger problem' *Id.* at 2026-27. The problem is the fact that it is often the case that the same underlying conduct can constitute an offense under both the

substantive SUA involved and the money laundering statute. *Id.* (*HEDLUND*, page 2,
"1. Legislative History and headnote 2 under "merger").

On page 3 of the WL record, under "3. Stare Decisis," the court states:

> "Justice Scalia undertakes to describe the stare decisis effect of Justice Stevens' opinion as limiting the holding to the judgment entered on the narrow ground that 'proceeds' means 'profits' when there is no legislative history to the contrary. *SANTOS*, 128 S.Ct. at 2031 (plurality opinion). Justice Stevens says, "that is not correct". *Id.* at 2034 n.7 (Stevens, J. concurring). Justice Stevens describes the grounds of his decision as including the lack of legislative history, **and** his conclusion that **Congress could not have intended the 'perverse' result caused by the 'merger problem' that is produced by Justice Alito's opinion**. *Id.* (Emphasis added) He concludes that when both circumstances [the merger problem and perverse results] are considered, the rule of lenity may have weight; that the plurality opinion is persuasive; and that he concurs in the judgment. *Id.*"

In *HEDLUND*, Supra, the Honorable D. Lowell Jensen, a 22-year veteran in that court concluded that the word "proceeds" can't mean different things

in different applications of the same statute. At page 4 of the opinion in *HEDLUND*, the court continues:

> "Justice Scalia...describes Justice Stevens' position as 'original with him', as an 'interpretative contortion', and that 'it has no precedent in our cases'. *Id.* [at 2034] Justice Scalia points out that just three years ago the Supreme Court held in *Clark v Martinez*, that 'the meaning of words in a statute **cannot** change with the statute's application'. *Id.*" (Emphasis added)

In his conclusion in *HEDLUND*, Judge Jensen said after weighing all the various potential reaches of the *Santos* decision:

> "The result of this analysis is that the Court believes that the Supreme Court in *SANTOS* has held that the word 'proceeds' in 18 U.S.C. § 1956 (a)(1)(A)(i) means 'profits' and that *Clark v Martinez*, requires that this result **must apply to every SUA listed in the statute**. The further result is that the money laundering conviction of defendant must be set aside". (Id., page 5 of 2008 WL 4183958) (All emphasis added)

However, the Respondent believes that, "contrary to petitioner's suggestion (Pet. 4), *SANTOS* did not hold that 'proceeds' universally means 'profits' in Section 1956." (See Opposition Brief at 6)

(Emphasis added) The Respondent's position is erroneous.

More and more federal courts are in line with this finding. In the *UNITED STATES v YUSUF*, 529 F3d 172, 183 (3rd Cir. 2009), that court held that the Santos decision effectively overturned their decision in *UNITED STATES v GRASSO*, 381 F.3d 160, 167 (3rd Cir. 2004). The *GRASSO* decision was based on money laundering in a mail fraud case as was the case in *YUSUF*.

Just a few weeks ago, the Seventh Circuit (where *Santos* originated) in *UNITED STATES v LEE*, 558 F3d 638 (7th Cir. 2009), the court applied the "profits" definition to money laundering in a case involving a prostitution scheme where the SUA was a violation of 18 U.S.C. § 371 and 1952(a), vacating the Lees' convictions in counts alleging a violation of 18 U.S.C. § 1956(a) (1).

In *UNITED STATES v BAKER*, 2008 WL 4054998 (E.D.Mich. August 27, 2008), that court held that the Government was wrong to conclude that *SANTOS* only applies to illegal gambling lotteries.

In *UNITED STATES v SHELBURNE*, 563 F. Supp.2d 601, 607 (W.D.Va.2008), that court held that it "disagreed with the governments narrow construction of *SANTOS*." That court held that payments for rent and equipment were not from profits; (see also *UNITED STATES v POULSEN*,

568 F.Supp.2d 885, 913-914 (S.D.Ohio.2008) (The court was applying *SANTOS* in a fraud case).

3. There is no meaningful distinction between "normal" expenses and "essential" expenses in this Court's decision in *SANTOS*.

The Respondent has drawn a distinction between these two words due to Justice Stevens' use of the term in his concurring opinion. For the same reasons set forth above, Petitioner avers that this does absolutely nothing to dilute the salient parts of this Court's decision in *SANTOS*.

The Santos Court's position rather seems to be that if one is charged with using "proceeds" to pay expenses, "his illegal activity cannot possibly violate the money laundering statute, because by definition profits consists of what remains after expenses are paid". (*SANTOS*, 170 L.Ed.2d at 922) (Plurality opinion)

CONCLUSION

It appears obvious that the lower courts need some kind of direction from this Court in order to resolve the conflicts between them on the application of *SANTOS*. Rule 1 of this Court focuses on resolving conflicts. Petitioner respectfully prays that the Court will grant him the relief requesting in his Petition while resolving these conflicts.

Respectfully submitted,

Gene A. Tyrrell, Petitioner Pro Se

Gene A. Tyrrell
Reg. No. 80041-008
Federal Prison Camp
P.O. Box 5000
Florence, Colorado 81226-5000
No phone number
PETITIONER PRO SE

June 8, 2009